

December 19, 2012

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Telecommunications Relay Service and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, CG Docket No. 03-123

Dear Ms. Dortch:

On Tuesday, December 18, 2012, and Wednesday, December 19, 2012, Paul Kershisnik of Sorenson Communications, Inc. (“Sorenson”), and Chris Wright and I, also on behalf of Sorenson and its subsidiary CaptionCall, LLC (collectively with Sorenson, “CaptionCall”), met separately with the following:

- Nicolas Degani, Wireline Legal Advisor to Commissioner Pai;
- Angela Kronenberg, Wireline Legal Advisor to Commissioner Clyburn;
- Jonathan Chambers, Acting Chief of the Office of Strategic Planning and Policy Analysis, and Elizabeth Andrión, Acting Chief Counsel and Senior Legal Advisor to Chairman Genachowski;
- Priscilla Argeris, Legal Advisor to Commissioner Rosenworcel; and
- Christine Kurth, Policy Director and Wireline Counsel to Commissioner McDowell;
- Sean Lev, General Counsel, Suzanne Tetreault, Deputy General Counsel, and Marcus Maher, Assistant General Counsel.

We distributed the attached handout, which summarizes the points discussed in each meeting. We stated that rather than adopt immediate rules, upon which the Commission would then seek comment, it should, and is legally required to, provide notice and seek comment before adopting rules. We stated that the standards for invoking the “good cause” exception cannot be met.

In addition, we stated that “good cause” cannot be established because the TRS Fund may have been underforecast this year. The Commission has dealt with this type of problem on two previous occasions, and in each instance adjusted the contribution factor to ensure that the Fund was not exhausted and that the Commission could comply with the Anti-Deficiency Act without stopping all payments.

Ms. Marlene H. Dortch
December 19, 2012
Page 2

Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "John T. Nakahata".

John T. Nakahata
Counsel to CaptionCall, LLC

Attachment

cc: Elizabeth Andrion
Christine Kurth
Angela Kronenberg
Priscilla Argeris
Nicolas Degani
Jonathan Chambers

Sean Lev
Suzanne Tetreault
Marcus Maher
Karen Peltz Strauss
Robert Aldrich
Gregory Hlibok

**THE COMMISSION SHOULD SEEK COMMENT ON IP CTS RULES
RATHER THAN ISSUING EMERGENCY FINAL RULES**

- **There is no emergency necessitating adoption of final rules prior to seeking notice and comment.**
- **Only consumers who need captioning are signing up for IP CTS, rather than those who do not.**
 - *ALL or nearly all* of CaptionCall’s users have a cochlear implant or one or two hearing aids.
 - Of those customers for whom CaptionCall has data (which is over 80% of CaptionCall subscribers), **83%** have a cochlear implant or two hearing aids, and 17% have a single hearing aid. (Of course, some consumers who may need two hearing aids have only one, either for affordability or comfort.)
 - Trainer anecdotal experience suggests that the other CaptionCall users will have a similar profile.
 - Even with a hearing aid, consumers can have difficulty using the telephone, which has a limited frequency range – usually 300 to 3,400 Hz.
 - 40-70% of hearing aids do not have a tele-coil. Tele-coils also can be difficult to use optimally.
 - “In-the-ear” hearing aids block signals used in phone conversations and can be challenging for telephone use because all sound must be processed and is limited by the range of the device.
 - For “receiver-in-canal” or open hearing aids, there can be difficulty hearing on the telephone due to the movement of the microphone away from the ear canal.
 - Phone conversations can be centered in the frequencies that are not amplified enough and are not compressed enough to deliver clear delivery of telephone signals.
 - Wide Dynamic Range Compression, the standard algorithmic “volume control” in nearly all hearing aid fittings since 2003, has been proven to miss or under amplify signals from both cell phones and land lines.
 - Overall, having at least one hearing aid or a cochlear implant makes it likely that the consumer will need and benefit from captioning for at least some telephone calls.
 - CaptionCall requires its subscribers to certify that they have a medically recognized hearing disability, even though that has not been required to date.
- **If the Commission needs to establish a hearing-loss eligibility standard for IP CTS, it should permit any consumer that has a hearing aid or cochlear implant to be eligible.**
 - A -70 dB minimum hearing loss threshold (severe hearing loss) will exclude many who could use and benefit from IP CTS.
 - To be consistent with the ADA’s mandates, eligibility thresholds must tie to functionality and cannot reflect mere budgetary concerns.

- **One-time referral fees that are not tied to usage are a cost-effective outreach tool that does not significantly increase the risk of eligibility fraud.**
 - CaptionCall pays referral partners a modest (generally \$50) fee for a successful referral. The fee in no way ties to the volume of calls captioned, or whether any call is captioned for the referred and installed subscriber.
 - CaptionCall's referral fees compensate a professional for the administrative time spent making the referral, and they compensate non-professionals (e.g. friends) for the courtesy and effort of the referral.
 - Referral fees are a cost effective form of cooperative outreach, similar to cooperative advertising.
 - Advertising alone is much more expensive per successful added user.
 - Referral fees average a little over two per partner per month (excluding partners that have never received a referral fee).

- **There is no justification here for failing first to provide notice and comment.**
 - The APA's "**good cause exception**" permits an agency not to give notice and take comment before adopting a rule if doing so would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).
 - The D.C. Circuit has "made clear that the good cause exception is to be narrowly construed and only reluctantly countenanced." *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012) (internal citation omitted).
 - The impracticable" exception applies only where safety issues are presented or "an entire industry and its customers were imperiled." *Id.* at 93. Clearly not applicable here.
 - The "unnecessary" exception has been "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and the public." *Id.* at 94. Clearly not applicable here.
 - The "public interest" exception is met "only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest—would in fact harm that interest." *Id.* at 95. Clearly not applicable here. If there were reason to think that persons who are not hard of hearing are obtaining CaptionCall service the exception might apply, but that is simply not the case.